

September 10, 2020

State Records Committee Meeting

Date: September 10, 2020

Time: 9:00 a.m. – 3:00 p.m.

Committee Members Present:

Kenneth Williams, State Archivist

David Fleming, Private Sector Records Manager

Patricia Smith-Mansfield, Chair, Citizen Representative

Tom Haraldsen, Media Representative

Nancy Dean, Political Subdivision Representative

Committee Members Not Present:

Vacant, Electronic Records and Databases Representative

Holly Richardson, Citizen Representative

Legal Counsel:

Paul Tonk, Assistant Attorney General

Nicole Adler, paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Telephonic participation:

Mike Favero

Others Present via Google Hangout:

Marie Cornwall

Micah Vorwaller

Susan Mumford

Steven Onysko

Brady Eames

Craig Hale, Utah Local Government Trust

Jeff Barben, Logan City School District

Frank Schofield, Logan City School District

Patrick Tanner, Counsel, Logan City School District

JERemy Cook, Emigration Improvement District

Cathryn Cordray

Jill Flygare, Utah Inland Port Authority

Lindon Rex, Counsel, Utah Inland Port Authority

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Cindy St. Clair, KSL

Jordan Thomas, law clerk, Department of Health

Charla Haley, Department of Health

Tom Hudachko, Department of Health

Brittany Huff, Assistant Attorney General

Christine Webb

Mark Tracy

Johnny Q. Public

Lionel Trepanier

Elise Lazar

Eric Hawkes

Kendra Yates

Agenda:

- Five Hearings Scheduled
 - Cindy St. Clair (KSL) v. Department of Health
 - Brady Eames v. Utah Local Government Trust
 - Mike Favero v. Logan City School District
 - Steven Onysko v. Emigration Improvement District
 - Cathryn Cordray v. Utah Inland Port Authority

- Business:
 - Approval of August 27, 2020, minutes, action item
 - SRC appeals received and declined, notices of compliance, and related action items
 - Cases in District Court, report
 - Other Business
 - Status of pending committee member approval, report
 - Committee member's attendance for the next meeting to verify the attendance of a quorum

Call to Order

The State Records Committee Chair, Patricia Smith-Mansfield, called the meeting to order at 9:04 a.m.

Business part 1 of 2

The Chair read a letter stating the meeting will be held electronically and telephonically without an anchor location pursuant to Utah Code 52-4-207(4). The public may monitor the meeting and any public wishing to comment in the meeting can submit their request to the Executive Secretary. The letter is active for 30 days.

1. KSL v. Department of Health

The Chair announced the hearing and provided instructions and reviewed the procedures.

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Petitioner's statement:

Ms. St. Clair stated there were two requests seeking the number of COVID-19 cases in each nursing home. She stated KSL is asking for the nursing homes to be named, but not personal information of the patients. She stated providing this information would not be a violation of HIPAA. She stated the federal government had previously declared this information was in the public interest.

Ms. St. Clair stated there is a significant lag in nursing home reporting to the Department of Health. She stated some places report every location with outbreaks, not just nursing homes, but businesses. This information helps the public protect themselves.

She stated the Department of Health argued non disclosure protects commercial information. She stated it is not relevant considering inspection data for these businesses is already public. She stated it is the public's right to know where COVID-19 cases are happening historically, not just real time so the public knows if a nursing home is a safe place for their loved one.

Respondent's statement:

Ms. Thomas is a law clerk and law student working with the Department of Health. She stated the Department responded to the request by indicating that information was on the website dashboard. She stated the dashboard shows the number of long term care facilities with cases, how many are resolved, the number of deaths, along with other information. She stated the petitioner requested the names of the nursing homes, but that information is protected under the Communicable Disease Act. She stated COVID-19 is contracted by the resident, not the facility, so information is based on the individual.

Ms. Thomas stated if the nursing home names are released, it would be easy to determine who the residents are by looking at the death date. She stated the nursing home is their residence, so it is also an invasion of their privacy.

Question from Committee:

The Committee asked what was the lowest resident rate of a facility? Ms. Jordan was unable to find it.

Respondent Statement:

Ms. Thomas stated the DOH doesn't have any records of complaints regarding the nursing homes, which was the second record request.

Petitioner closing:

Ms. St. Clair stated disclosure of this information is in the public interest. She stated they are respectful of health conditions and do not want to identify individuals. She stated they do not think this information will identify the patient, and the Communicable Disease Act does not protect the collective facility.

Respondent closing:

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Ms. Thomas stated they want to make sure they balance the public interest with the interest of the individual suffering from COVID-19. She stated the records are protected under Utah Code 26-6-27, therefore they need to protect the patient's privacy.

Question from Committee:

The Committee asked the respondent if there is a place the public can get a list of all residents in a facility. Ms. Thomas responded that she did not think so.

Deliberation:

Motion by Ms. Dean to grant the appeal that the information sought will not identify the individual so it is not protected under title 26-6 or GRAMA. Seconded by Mr. Williams.

Discussion to the motion

The Committee stated the governmental entity has a responsibility to redact personal identifying information so disclosure is in line with title 26-6. The Committee stated the name of the facility is not enough to identify the residents.

Aye: 5 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

The Committee sauntered for 7 minutes.

2. Brady Eames v. Utah Local Government Trust

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's Statements:

Mr. Eames stated there are three appeals in this hearing. He stated he is concerned a board under the Utah Local Government Trust (ULGT) is not legal because it does not specify by contract or law the manner in which officials are elected or appointed to the board. He stated that he was allowed to inspect the records.

Mr. Eames stated the second request relates to a trust advisory committee established to advise the executive director. He stated it is a public body advising the director so the records should be provided.

Mr. Eames stated the last request relates to five insurance trust funds. He stated budgets are required to be publicly available during business hours. He stated he has not been offered a chance to visit the office to inspect the records.

Committee question:

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The Committee asked what website he was looking at. Mr. Eames stated it was the Utah Trust website. The Committee asked if he looked at the Auditor's website. He stated the records should be available in the respondent's office.

Respondent's Statements:

Mr. Hale stated Mr. Eames testimony is consistent with his written response. He stated Mr. Eames already has copies of most of the records he's requested. He stated the appeal should be denied because record access has not been denied.

Mr. Hale stated Mr. Eames wants to fight a lot of battles using the State Records Committee. He stated the Trust Advisory Committee was formed to gather information to better serve the members of the trust. He stated the Committee is not a public body, does not spend revenue, and does not make decisions. He stated there are no records responsive to the request and the appeal should be denied.

Question from the Committee:

The Committee asked if there are no records related to the Trust Advisory Committee's creation or descriptions of what their responsibilities are. Mr. Hale stated the Committee meets four or five times a year to discuss pending insurance issues, or how the trust can better operate. He stated there is no reason to keep recordings of minutes because they are informal discussions. The Committee asked if any other records are created. Mr. Hale stated the committee is made of members of the trust who discuss issues and no advice flows from them to the trust other than ideas. There may be handouts from presenters but that would be all.

Respondent statement:

Mr. Hale stated the last request has no responsive records. He stated budgets are submitted to the State Auditor and they directed the petitioner to that website. He stated nothing in law requires the Trust to publish budgets on their website.

Petitioner's Closing:

Mr. Eames stated the response he received led him to believe records existed because he was required to pay a \$50 fee to inspect the records. He stated the budget is required to be available in the office during regular business hours and he would like to be invited to inspect the paper version.

Respondent's Closing:

Mr. Hale stated Mr. Eames doesn't want to get things online. He stated the petitioner can visit the office to inspect the records they have.

Question from the Committee:

The Committee asked for clarification about the fee requested. Mr. Hale stated they later let him inspect them for free.

Deliberation:

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Motions

In appeal 2019-110: Motion by Mr. Williams to deny the appeal all responsive records have been provided if they have them in their possession. Seconded by Ms. Dean. Passes 5-0

Vote: Aye: 5 Nay: 0. Mr. Williams, Ms. Dean, Mr. Fleming, Mr. Haraldsen, and Ms. Smith-Mansfield voted in favor of the motion.

In appeal 2019-111: Motion by Mr. Williams to deny the appeal as there are no records responsive to the request. Seconded by Ms. Dean.

Discussion to the motion:

Ms. Smith-Mansfield stated she is not convinced there are no records.

Vote: Aye: 3 Nay 2. Mr. Williams, Mr. Fleming, Ms. Dean voting in favor of the motion. Ms. Smith-Mansfield and Mr. Haraldsen voting against the motion.

In appeal 2019-114: Motion by Mr. Williams to deny the appeal as the petitioner has been referred to the Auditor's website per 63G-2-201(1 and 14), and 63G-2-201(8)(ii)(B).

Vote: Aye: 5 Nay: 0. Mr. Williams, Ms. Dean, Mr. Fleming, Mr. Haraldsen, and Ms. Smith-Mansfield voted in favor of the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

The Committee sauntered for 5 minutes.

3. Mike Favero v. Logan City School District

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's Statements:

Mr. Favero stated his appeal is based on the right to have access to public business. He stated he believes records are erroneously classified protected. He stated one hundred documents have been withheld. Some fall under the classification provided but some do not.

Mr. Favero stated it was odd to have the subject lines of emails redacted. He stated no privilege log was provided explaining the classifications and redactions. He stated the original response did not include text messages and no statement was provided that they were being withheld. He stated he did not ask for emails with attorneys and none of the emails provided say they are protected by attorney-client privilege.

Mr. Favero stated he was originally asked to pay \$120 which raised his suspicions. He asked the Committee to review the withheld records. He stated the original response did not contain the

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number of emails withheld and he has not seen the content, but he does not believe all one hundred emails fall under protected status.

Question from the Committee:

The Committee asked if he is concerned about records withheld in their entirety or the redactions. Mr. Favero stated he is not concerned about names, so he is okay with the redactions. The Committee asked if he is appealing the extraordinary circumstances. He stated he is not. He stated he is only appealing the emails withheld in their entirety.

Respondent's Statements:

Mr. Tanner stated Mr. Favero is a previous employee and the district gave him notice of termination for cause in 2018. He stated the petitioner exercised his right to challenge that before the Board of Education. He stated the emails are related to his termination and the concerns should have been addressed before the Board of Education.

Mr. Tanner stated 1,475 emails were produced and a privilege log was provided. He stated 92 emails were withheld. He stated subject lines including parent names or other protected information were redacted. He stated the records are protected under FERPA, employment records per 63G-2-302(2)(a), attorney-client privilege, work product per 63G-2-305(18), drafts, or bargaining per 63G-2-305(23)(a). He stated the employment records include people who are no longer employed with the school district.

Mr. Tanner stated 21 of the emails were withheld because they are student records under FERPA. He stated about 89 have redacted employment information. About 57 could not be redacted enough and were withheld. He stated 15 of them were also classified under 63G-2-305(17) as attorney-client privilege. He stated 8 of the emails included drafts and three fall under other classifications.

Mr. Tanner stated this request is a personal matter and is not in the public interest. He requested the Committee uphold the classifications and deny the appeal.

Petitioner Closing:

Mr. Favero stated he was never terminated, but resigned. He stated there is no threat of litigation and the request is related to the public's right to see what the School District is up to. He stated the public interest is greater than the need to restrict access because transparency leads to public trust.

Respondent Closing:

Mr. Tanner stated Mr. Favero misstated his end of employment because he resigned before the administrative hearing. He stated there are records related to the district's preparation for the hearing with the district's counsel. He stated they produced over 1,400 emails and have acted in good faith.

Deliberation:

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Motion by Mr. Williams to go in camera. Seconded by Mr. Fleming.

Vote: Aye: 5 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, and Ms. Dean voted in favor of the motion. Ms. Smith-Mansfield voted against the motion.

The Committee went in camera and planned to reconvene at 1:30pm.

Motion by Mr. Haraldsen to resume open session. Seconded by Mr. Williams

Vote: Aye: 5 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, and Ms. Dean voted in favor of the motion.

The Chair reviewed the designation of the records reviewed in camera and listed which ones were appropriately classified or not.

Motion by Mr. Fleming to deny in part and grant in part based on the in camera review. Seconded by Mr. Haraldsen.

Vote: Aye: 5 Nay: 0. Mr. Williams, Mr. Fleming, Ms. Smith-Mansfield, Mr. Haraldsen, and Ms. Dean voted in favor of the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

4. Steven Onysko v. Emigration Improvement District

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's Statements:

Mr. Onysko stated his appeal isn't about classification, or a fee waiver. He stated he has a right to inspect a public record free of charge. He stated he has not asked for copies because that can include a fee.

Mr. Onysko stated he is not requesting a fee waiver, because he is not responsible to pay for the respondent to go through the records they already have. He stated he can go through the records on a table. He stated his request is not too broad because GRAMA does not use that word. He stated being more specific would have made fees an option and he would prefer to go through the records himself to find the information he wants.

Respondent's Statements:

Mr. Cook stated the Emigration Improvement District (EID) is really small and provides water service to Emigration Canyon. He stated Mr. Onysko is a former employee of the Department of Environmental Quality and is involved in lawsuits. He stated he believes this request is directly

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related to that because he is not a resident in the canyon and has never been hooked up to their water system.

Mr. Cook stated the district does not have their own office so the petitioner needs to schedule a time to see the records where they can bring the records to him. He stated the petitioner is requesting all records involving lead contamination and there is no time frame. Any records involving the word "lead" includes a lot of correspondence and other records. He stated they informed the petitioner providing this would be expensive and time consuming and asked him to narrow it down. Mr. Cook stated EID relies on third party contractors to search the records so they need to narrow the scope or they need to charge the cost of staff time to compile the records. He stated the fee is charged by the contractor who provides records management services at \$58 per hour. That is their lowest paid employee because the district has no employees.

Question from the Committee:

The Committee asked if the entity has begun searching for responsive records and have classifications of estimate of records. Mr. Cook stated they have no classifications prepared. They need to search the records to determine what they have. He stated they estimate 40 hours to fulfil the request. The Committee asked if they have some idea of what kind of records would be in there. Mr. Cook stated the responsive records would mostly be public. The problem is that they cannot let the petitioner search the records because there may be personal identifying information in the records.

Petitioner Closing:

Mr. Onysko stated he has an appeal next month because he can't get these records from other entities. He stated the respondent is being disingenuous. He stated he is an expert in drinking water issues and has no ulterior motives. He stated EID cannot charge a fee to inspect a record. He stated it is not his concern that there are a lot of boxes and no employees. He stated GRAMA says he can find what he's looking for by himself because he has the expertise.

Respondent Closing:

Mr. Cook stated GRAMA agrees with their fees. He stated EID does not know what he is looking for because his request is too broad and requires them to go through all of their records. He stated they would be happy to provide sampling data.

Deliberation

Motion by Mr. Williams moves to deny the request because it is voluminous per 63G-2-204(4). Seconded by Ms. Dean.

Discussion to the motion:

Ms. Smith-Mansfield stated there's nothing to rule on classification because the entity hasn't done that yet so the Committee is saying being voluminous bypasses the classification.

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Vote: Aye 5. Nay: 0. Ms. Yates, Mr. Fleming, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

Motion by Mr. Williams to assess the fee taking into consideration 63G-2-201(13)(a), 63G-2-302(2) Seconded by Ms. Dean.

Vote: Aye 5. Nay: 0. Ms. Yates, Mr. Fleming, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

The Committee sauntered for 3 minutes.

5. Cathryn Cordray v. Utah Inland Port Authority

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's Statements:

Ms. Cordray stated the Utah Inland Port Authority (UIPA) is moving forward on a controversial project and the public is unaware of its activities. She stated the public has a right to follow the board's actions. She stated her request is for records referencing electronic meetings policy, plans, and all records created and distributed to facilitate an electronic meeting.

Ms. Cordray stated the respondent twice denied the existence of records and provided records afterwards. She stated one provided email shows there was an attachment referring to policies but the attachment was not provided. She stated the attachment is responsive to the request because it is part of a responsive email.

Ms. Cordray stated there is evidence other emails may exist because her initial request was not provided as a responsive record. She stated a search should be expanded to include search terms such as "webinar", "online meeting", "electronic meeting", "zoom", and "virtual". She stated the results should be provided including which email accounts were searched and the justification of any withheld.

Respondent's Statements:

Mr. Rex stated the records officer did a search and no responsive records were returned. In an effort to be helpful, they thought the petitioner would be interested in the Executive Order so it was provided even though it is not UIPA's record. He stated the Chief Administrative Officer asked what kind of records she may be searching for and referred her to the open meetings information on their website. He stated they provided their pre-COVID-19 policy. He stated in preparation for this hearing they did another search and identified one email that was provided.

Question from Committee:

The Committee asked what kind of entity they are on the Public Notice Website. Mr. Rex stated they are a state entity. He stated their board meeting materials are on both their website and the Public Notice Website. The Committee asked if they provided a statement from the Chair

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regarding a meeting with no anchor location per the Open and Public Meetings Act. Mr. Rex stated that addition to OPNA came after the request.

Petitioner Closing:

Ms. Cordray stated an attachment was withheld. She stated they had not specified whose accounts were searched and what search terms were used. She stated her request did not include search terms so she does not know what was searched. Ms. Cordray stated her own email asking for the records should have come up in the search and been provided.

Respondent Closing:

Mr. Rex stated they've done searches twice and no responsive records were found. He stated the UIPA couldn't have done anything more to be responsive in this case.

Question from Committee:

The Committee asked Mr. Rex to respond to the petitioner's statement that her emails should have come up in the search. Mr. Rex stated the initial request was not in an email but in the Open Records Portal. However, even if it did come up in a search, she already has it because she created it.

Deliberation

Motion by Mr. Williams the request be denied as all records responsive have been provided. There was no second.

Motion by Ms. Dean that the respondent has done a thorough search but the attachment to the email needs to be provided as policies are public. Seconded by Mr. Fleming.

Vote: Aye 5. Nay: 0. Ms. Yates, Mr. Fleming, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

Business part 2 of 2

Motion by Ms. Dean to approve the August 27 minutes. Seconded by Mr. Fleming.

Vote: Aye: 5 Nay: 0. Mr. Williams, Ms. Dean, Mr. Haraldsen, Mr. Fleming, Ms. Smith-Mansfield voted in favor of the motion.

Report on Cases in District Court: Paul Tonks, Assistant Attorney General, provided updates on the current appeal cases under judicial review.

Committee members' attendance polled for next meeting, format and quorum verification. The Chair verified a quorum will be present at the September 24th meeting.

Motion to Adjourn

The Chair adjourned the August 27, 2020, State Records Committee meeting at 4:11 p.m.

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This is a true and correct copy of the September 10, 2020, SRC meeting minutes, which was approved on September 24, 2020. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.

X /e/ Rebekkah Shaw
Executive Secretary